BRIEF IN SUPPORT OF PETITION.

OPINIONS BELOW.

There was no opinion in the trial court. The opinion of the Supreme Court of Missouri is reported in 148 S. W. (2d) 499, and became final on March 13, 1941, when a Motion for Rehearing and a Motion to Transfer to Banc were denied.

JURISDICTION.

Reference is made to the jurisdictional statement contained in the petition in this Court.

STAY OF MANDATE.

The Supreme Court of Missouri has entered an order staying the Mandate during the pendency of the proceedings in this Court.

STATEMENT OF CASE.

Reference is made to the Summary Statement of Matter Involved, contained in the petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Section 21, Article II, of the Constitution of Missouri provides as follows:

> "**Private property for public use—compensation.**—That private property shall not be taken **or damaged** for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the

proprietary rights of the owner therein divested. The fee of land taken for railroad tracks without consent of the owner thereof shall remain in such owner, subject to the use for which it is taken." (Emphasis ours.)

Section 8750, R. S. Mo. 1939 (being the same as Section 8102, R. S. Mo. 1929, referred to in the opinion), so far as material, provides as follows:

"* * * The commission shall have a seal bearing the inscription 'State highway commission of Missouri,' which shall be in the custody of the secretary, and shall be affixed to all official documents of the commission, or of the engineer, and to such other instruments as the commission shall direct. The courts of this state shall take judicial notice of said seal. The commission may sue and be sued in its official name, and for the purpose of suit and other legal proceedings, service may be had on the secretary. * * *"

This section is part of Chapter 46, Article 13, R. S. Mo. 1939, entitled "State Highway Department—State Highway System." This is the only section in said Article, or elsewhere in the Missouri statutes, which deals with suits against the State Highway Commission of Missouri.

The last sentence of Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

SPECIFICATIONS OF ERRORS TO BE URGED.

I. The opinion and decree of the Supreme Court of Missouri denies equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States by discriminating between property holders in municipalities and property holders elsewhere in the State, arbitrarily granting damages for change in grade of a highway to one class and denying such damages to another class, where there is no reasonable basis for such discrimination.

II. If the opinion and decree of the Supreme Court of Missouri can properly be construed as granting immunity from suit to the State Highway Commission of Missouri, as distinguished from attempting to deny liability for the damage to petitioner's property, it is a violation of the Constitution of the United States prohibiting a State from denying its citizens the equal protection of its laws.

III. The opinion and decree of the Supreme Court of Missouri deprives the petitioner of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

SUMMARY OF ARGUMENT.

The same as the above Specifications of Error.

ARGUMENT.

I. The opinion and decree of the Supreme Court of Missouri denies equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States by discriminating between property holders in municipalities and property holders elsewhere in the State, arbitrarily granting damages for change in grade of a highway to one class and denying such damages to another class, where there is no reasonable basis for such discrimination.

The Missouri constitutional provision was amended in 1875 by adding the words "or damaged," which are not contained in the Fifth Amendment or in most early State constitutional provisions of like nature. It was first interpreted in *Householder v. The City of Kansas*, 83 Mo. 488 (1885), as granting a cause of action for damages on account of change of grade, the cases prior to the amendment having held such damages to be damnum absque injuria. There was no city charter or statutory provision for its enforcement, but it was held to be self-enforcing. The authority of this case was recognized by a long line of decisions set forth in *Tremayne v. City of St. Louis*, 320 Mo. 120, 6 S. W. (2d) 935, although the *Tremayne* and other cases hold that where, subsequently, city charters have provided a procedure, this procedure must be followed as being a statutory method for further carrying out the terms of the constitutional provision.

This Court gave a like interpretation to a similar amendment of the Illinois Constitution. *City of Chicago v. Taylor*, 125 U. S. 161, 31 L. Ed. 638.

In the present case,[1] following *Zoll v. St. Louis County*, 343 Mo. 1031, 124 S. W. (2d) 1168, decided during the pendency of the present case,[2] the Supreme Court of Missouri held: "* * * but as we pointed out in the *Zoll* case (124 S. W. [2d], l. c. 1172), such (municipality) cases are not authority for the maintenance of such case as here **because the municipality is acting in a private and proprietary capacity and for its own private benefit.**" (Emphasis ours.) This statement is palpably unsound. A municipality does not act in a private capacity when it damages property in the change or improvement of a public highway. This is shown by the citation from 13 R. C. L., p. 79, Sec. 70, cited in the opinion itself. It is there stated that a city acts, in such cases, in a governmental and not in a private capacity.[3] The statement in the opinion is not conclusive upon this Court.

This Court has many times held that when the Fourteenth Amendment is involved, it draws its own conclusions, and need not follow the reasoning of the decision of the State Supreme Court. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220; *Cumberland Coal Co. v. Board of Revision*, 284 U. S. 23, 76 L. Ed. 147; *Iowa-Des Moines National Bank v. Bennett*, 284 U. S. 239, 76 L. Ed. 265. The latter two cases involved the arbitrary application of tax laws fair on their face, and the decision of the Supreme Court of the State is treated as part of the arbitrary action. The *Bennett* case especially emphasizes the action

1 It would be inferred from the opinion that *State ex rel. State Highway Commission v. Bailey*, 234 Mo. App. 168, 115 S. W. (2d) 17, is to the same effect as the present case, but when the full paragraph is read from which the quotation in the opinion is taken, it is apparent that the holding was that damages could not be recovered on account of improvements erected on an unused part of the highway right of way, when the Highway Commission later decided to use its entire right of way and widen the same. This decision was also during the pendency of the present case.

2 The *Zoll* case also violates the Fourteenth Amendment, but certiorari proceedings were not instituted in this Court.

3 148 S. W. (2d), l. c. 501-502.

taken by the Supreme Court of the State. Probably the latest holding is *Smith v. Texas*, 85 L. Ed., Adv. Opin. 106 (Nov., 1940), where it is stated:

> "* * * The fact that the written words of a State's laws hold out a promise that no such discrimination will be practiced is not enough. The Fourteenth Amendment requires that equal protection to all must be given—not merely promised."

So here the Missouri constitutional provision as to damaging property for public use contains not a hint of any discrimination, but that all who are damaged must be compensated. The opinion of the Supreme Court of Missouri arbitrarily attempts to deprive petitioner of its compensation because its property is located 1,500 feet beyond the city limits on Page Boulevard (R. 77).

Discriminations as to locality may be made when they are reasonable, but not otherwise. In *Liggett Co. v. Lee*, 288 U. S. 517, 77 L. Ed. 929, a chain store tax rate increase when the chain operated in more than one county was held to have no reasonable basis for such classification. This Court states:

> "* * * but an increase in the levy not only on a new store but on all the old stores, **consequent upon the mere physical fact that the new one lies a few feet over a county line**, finds no foundation in reason or in any fact of business experience. * * *" (Emphasis ours.)

So here the property is just as much damaged for public use as though it were 1,500 feet further east in the same metropolitan area. It is true that three justices dissented, but their dissent is based on a special theory of taxation as applied to chain stores, which does nothing to weaken the reasoning of the majority opinion, as applied to the

Missouri constitutional provision which promises compensation to everybody whose property is damaged for public use, regardless of where it is located.

While most cases arise under taxation or restrictive laws, the Fourteenth Amendment does not purport to exempt laws that constitute a grant rather than a restriction. For example, a State has the right to offer to its citizens any degree of free education that it sees fit. But when it makes this voluntary offer, then it can be compelled by suit to offer the same educational rights to all of its citizens, without discrimination. *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337, 83 L. Ed. 208.

For the above reasons the opinion and decree of the Supreme Court of Missouri denies equal protection of the laws to the extent that it attempts to nullify the Missouri constitutional provision as to the petitioner, a holder of property outside the boundaries of any municipality.

II. **If the opinion and decree of the Supreme Court of Missouri can properly be construed as granting immunity from suit to the State Highway Commission of Missouri, as distinguished from attempting to deny liability for the damage to petitioner's property, it is a violation of the Constitution of the United States prohibiting a State from denying the equal protection of its laws.**

In the first half of the opinion,[1] in the midst of a general discussion which seems to have more to do with liability for damages as distinguished from immunity from suit, the Court construes Section 8750, R. S. Mo. 1939 (referred to in the opinion as Sec. 8102, R. S. Mo. 1929), providing that the State Highway Commission may "sue and be sued," to mean that there must be some special statute particularly involving the identical character of suit which may be at issue. This section is a part of Chapter 46,

1 148 S. W. (2d), l. c. 500.

Article 13, R. S. Mo. 1939, entitled "State Highway Department—State Highway System," and nowhere in this Article, or elsewhere in the Missouri statutes, is there any provision other than said Section 8750 authorizing suit against the State Highway Commission. As we read the opinion, if the Supreme Court of Missouri merely meant that the State Highway Commission has immunity from suit (as distinguished from liability in an action) in spite of the express provision that it may "sue and be sued," then the effect of the opinion would be not only to delete from the statute the words "and be sued" but to overrule a long line of cases set forth in *Bush v. State Highway Commission of Missouri*, 329 Mo. 843, 46 S. W. (2d) 854, which case sharply distinguishes between immunity from an action as distinguished from liability.[1] We do not believe that it should be assumed that the Supreme Court of Missouri intended any such extreme holding, if there is anything else in the opinion which will justify an interpretation in accordance with the words of the statute, and the established law of the State of Missouri pertaining to the nonimmunity from suit of the State Highway Commission. A later portion of the opinion[2] refers to the decision in *Hill-Behan Lumber Company v. Skrainka Construction Co.*, 341 Mo. 156, 106 S. W. (2d) 483, which had been previously brought against the contracting company and the members of the State Highway Commission to enjoin the building of the viaduct, in which the Court in the instant case states: "It was held that plaintiff was not entitled to injunctive relief because there was adequate remedy at law for any damages which plaintiff 'may have sustained.'"[2] The Court, in the opinion in the instant case, then states: "The

1 The *Bush* case announced the doctrine of substantive law that the State Highway Commission was not liable for the negligent torts of its agents, while fully recognizing the distinction between immunity from an action and liability. It was not a divisional opinion, but is by the entire Court en banc.

2 148 S. W. (2d), l. c. 502.

question of whether the plaintiff was **entitled** to recover damages was not before the court in the injunction suit, and the **effect** of the opinion in that case is no more than that if plaintiff was entitled to recover damages it had an adequate remedy at law."[2] (Emphasis by the Court.) It seems apparent that the Court intended to treat the decision in the *Skrainka* case as being either res adjudicata, or at least as not being overruled. This particularly appears from the emphasis used by the opinion in referring to said case as not involving the question of liability for damages but merely holding that the plaintiff had an adequate remedy at law for damages, if any. We do not see how this treatment of the *Skrainka* case could be reconciled with a construction of the opinion in the present case to the effect that the petitioner not only did not have an adequate remedy at law, but has no remedy whatsoever, assuming that it sustained compensable damages.

However, in view of conflicting statements in the opinion, we will assume for the purpose of this argument the Supreme Court of Missouri intended to hold that, irrespective of whether or not there was liability for the damages sustained, the State Highway Commission of Missouri has been granted immunity from suit.

We wish to call the attention of this Court to the very recent case of *Reconstruction Finance Corporation v. J. G. Menihan Company,* 85 L. Ed., Adv. Op. 458 (Feb. 3, 1941), where this Court followed a series of earlier cases dealing with federal corporations, in holding that it was the intent of Congress that the Reconstruction Finance Corporation, and other such federal governmental agencies, should have no privilege whatsoever as to immunity from suit. In this case, and in the case of *Federal Housing Administration v. Burr,* 309 U. S. 242, 84 L. Ed. 724, and *Keifer & Keifer v. Reconstruction Finance Corporation,* 306 U. S. 381, 83

2 148 S. W. (2d), l. c. 502.

L. Ed. 784, this Court holds that the words "sue and be sued" (which appear in Sec. 8750, R. S. Mo. 1939) mean what they say and render such governmental agencies generally subject to suit. These decisions recognize the "present climate of opinion," which has brought "governmental immunity from suit into disfavor." While these cases recognize that the Congress had the right to grant its agencies immunity from suit, it should be borne in mind that the Fourteenth Amendment places no restrictions upon the Congress, which is able to grant immunity from suit under conditions where a State could not do so without violating the Fourteenth Amendment. These cases dealing with governmental corporations, which are referred to as agencies, are further significant because the Supreme Court of Missouri in *State ex rel. State Highway Commission of Missouri v. Bates*, 317 Mo. 696, 296 S. W. 418, states that the State Highway Commission "is a legal entity with powers of a corporation," developing the subject at considerable length. We do not interpret the present opinion as overruling the *Bates* case.

Most cases dealing with State immunity arise under the Eleventh Amendment, which is not applicable here. It has been definitely settled that proceedings in the Supreme Court of the United States to reverse alleged unconstitutional opinions and decrees of the Supreme Court of the State are not considered as suits against the State within the meaning of the Eleventh Amendment, even though the writ may be issued against the State. We do not believe that any doubt has been raised as to this question since the case of *Hans v. Louisiana*, 134 U. S. 1, 33 L. Ed. 842, cited with approval in *Monaco v. Mississippi*, 292 U. S. 313, 78 L. Ed. 1282. Where no provision of the Constitution of the United States is involved, it has been uniformly held that a State has the sovereign right to repudiate its bonds or other obligations, and that this right cannot be evaded by a suit against a State officer or agency which would

have the effect of compelling the State to carry out its obligations. On the other hand, if State officers or agencies purport to act under void laws, or otherwise take void action, they may be enjoined or otherwise held liable to suit. For a good discussion of when a suit nominally brought against an individual or agency is really in the nature of a suit against the State, we refer the Court to the case of *In the Matter of the State of New York,* 256 U. S. 490, 65 L. Ed. 1057.

When the Fourteenth Amendment was enacted, the result was that each State surrendered its sovereign immunity from suit to the extent that such immunity would be inconsistent with the enforcement of the Fourteenth Amendment against the State. In *Missouri ex rel. Gaines v. Canada,* supra, the State of Missouri had elected to offer free legal education to its citizens. The State passed certain statutes which, as interpreted by the Supreme Court of Missouri, were held by this Court to discriminate against negroes in the matter of legal education. The suit was a mandamus suit filed against the curators of the University of Missouri, a state agency, seeking to compel them to enroll the relator in the Law School of the University of Missouri. The opinion of this Court reversed the Supreme Court of Missouri and required either that the relator be allowed an education at the expense of the State of Missouri in the Law School of the University of Missouri, or that law school facilities for him be established by the State of Missouri in Lincoln University, the State University for negroes. Under the rule announced in the case of *In the Matter of the State of New York,* supra, and cases cited therein, it is clear that where the action against the officer or agency seeks something at the expense of the State, or to indirectly enforce a State obligation, the suit is in nature of a suit against the State. Thus it is apparent that where it is necessary in order that a State may be

compelled to grant the equal protection of the laws to its citizens, that a suit be filed against the State or its officer or agency which would ordinarily be considered in the nature of a suit against the State, the ordinary sovereign right of immunity from suit cannot prevent such a suit where required to carry out the provisions of the Fourteenth Amendment.

We believe that the case of *Iowa-Des Moines National Bank v. Bennett,* supra, is very much in point, where the opinion of Justice Brandeis permitted a mandamus action to compel the refund of money which had been unconstitutionally exacted under a law which, as in the case of the Missouri constitutional provision, was fair on its face. The opinion of this Court held that the State was seeking to retain the money, and the opinion of the Supreme Court of Iowa was attempting to justify an unconstitutional act. This Court stated:

> "* * * Here, the exaction complained of was made by the treasurer in the name of and for the State, in the course of performing his regular duties; the money is retained by the State; and the judicial power of the State has been exerted in justifying the retention. * * *"

Both of the above cases, and many other cases, refer to the equal protection clause of the Fourteenth Amendment as being directed against State action, rather than individual action. We again refer the Court to the recent case of *Smith v. Texas,* supra, from which we have quoted under the preceding point.

In the *Skrainka* case, supra, the State of Missouri upheld the legality of the action of the State Highway Commission. The decision in that case was clearly not in violation of the Fourteenth Amendment, as the State, in granting the constitutional right that private property shall not

be damaged for public purposes without just compensation, can surely specify that compensation must be had by way of an action for damages. By the decision in the *Skrainka* case the Supreme Court of Missouri conclusively created the situation where the only manner in which the equal protection of the laws could be afforded was through a suit for damages against the State Highway Commission, which is the precise character of the suit here involved. The State cannot arbitrarily nullify its constitutional grant of the right to compensation for property damaged through public use by granting such right to residents of municipalities and denying such right to the petitioner who was unfortunate enough to be located on Page Boulevard just 1,500 feet west of the invisible city boundary. It cannot, by arbitrarily denying petitioner access to its courts after it has already determined that petitioner has an adequate remedy at law for damages, discriminate between the petitioner and residents of municipalities whom the Supreme Court of Missouri has in an unbroken line of decisions, recognized though not cited in the present opinion, held entitled to sue and recover damages in like circumstances.

We refer the Court to the case of *Prout v. Starr*, 188 U. S. 537, 47 L. Ed. 584, in which it is held that the Fourteenth Amendment is superior to State immunity. In that case, which was in the federal court, it was further held that the Eleventh Amendment must be reconciled with the Fourteenth Amendment, and the Court approved an injunction suit against certain State officers as individuals as being an appropriate method in that case. If such method was ever open to the petitioner, the Supreme Court of Missouri saw fit to block that method through the aforesaid *Skrainka* case, which in a constitutional manner granted the clear right to file an action for whatever damages may have been sustained. Therefore, especially in

view of the *Skrainka* case, the denial by the Supreme Court of Missouri of access by the petitioner to the Missouri courts to recover its damages constitutes a violation of the equal protection of the laws, and state sovereignty cannot be interposed to effectuate a violation of the Fourteenth Amendment.

We refer the Court also to the case of *Hopkins v. Clemson Agricultural College*, 221 U. S. 636, 55 L. Ed. 890, which was an action for damages against a State Agricultural College which, like the State Highway Commission of Missouri, had the right to "sue and be sued," and it was contended that action by the college in building certain dikes under the authority of an act of the Legislature had resulted in serious damage to the plaintiff's property. This Court stated:

> "If the State had in so many words granted the college authority to take **or damage** the plaintiff's property for its corporate advantage without compensation, **the Constitution would have substituted liability for the attempted exemption.** But the State of South Carolina passed no such act, and attempted to grant no such immunity from suit as is claimed by the College. On the contrary, the statute created an entity, a corporation, a juristic person, whose right to hold and use property was coupled with the provision that it might sue and be sued, plead and be impleaded, in its corporate name." (Emphasis ours.)

This seems to be a clear holding that where, as in the present case, the act resulting in damage to property is lawful, then there cannot, constitutionally, be immunity from a suit for damages.

III. **The opinion and decree of the Supreme Court of Missouri deprives the petitioner of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.**

We have no additional argument to make under this point. It is raised because due process and equal protection are so closely allied that there have been some decisions, such, for example, as *Buchanan v. Warley,* 245 U. S. 60, 62 L. Ed. 149, and followed in a memorandum opinion in *Harmon v. Tyler,* 273 U. S. 668, 71 L. Ed. 831, holding that segregation of negroes violates due process, which might, perhaps, be considered as rather involving equal protection. It is possible that this Court might consider that the opinion of the Supreme Court of Missouri violated due process rather than equal protection.

CONCLUSION.

We submit that the opinion of the Supreme Court of Missouri, for the reasons heretofore given, denies equal protection of the laws, or, if we are not correct in this, that it denies due process of law to the petitioner. We further submit that the decision is in conflict with the principles announced in the decisions of this Court heretofore referred to, and that a question of great public importance is involved for the reasons stated in the foregoing petition, and that therefore a writ of certiorari should issue as prayed for therein.

Respectfully submitted,

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